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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE VENTURA BARRAGAN-CERVANTES, Defendant and Appellant.	E047821 (Super.Ct.No. RIF131476) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Heather F. Crawford and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant, Jose Ventura Barragan-Cervantes, guilty of (1) two counts of willfully committing a lewd or lascivious act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a)(1));[1] (2) two counts of forcibly committing a lewd or lascivious act upon a child under the age of 14 years (§ 288, subd. (b)(1)); and (3) two counts of aggravated sexual assault (rape) of a child under the age of 14 years (§ 269, subd. (a)(1)). The trial court sentenced defendant to state prison for a determinate term of 26 years, and a consecutive indeterminate term of 30 years to life.

Defendant makes three contentions. First, defendant asserts that his due process rights were violated because substantial evidence does not support a finding that he forcibly committed a lewd or lascivious act (§ 288, subd. (b)(1)), on or before June 22, 2004 (count 1). Second, defendant contends that his due process rights were violated when the trial court sentenced him to full-term consecutive sentences for counts 4 and 7, because the offenses were committed during a single sexual assault. (§ 667.6, subd. (d).) Third, defendant contends the abstract of judgment, related to his indeterminate sentence, must be corrected. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Defendant's trial began on January 26, 2009. On that day, the victim testified she was 12 years old, and her next birthday would be June 23. Defendant was the victim's mother's boyfriend. When the victim was three years old, defendant began living with the victim and her mother. The victim's mother did not marry defendant,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

but the victim treated defendant as a stepfather. The remaining facts will be presented in the Discussion section, in order to avoid repetition.

DISCUSSION

A. COUNT 1

1. *Facts*

Count 1 of the information charged defendant as follows: The district attorney accused defendant of a violation of section 288, subdivision (b)(1), "a felony, in that on or between June 23, 2003, and June 22, 2004, . . . he did willfully, unlawfully, and lewdly, commit a lewd and lascivious act upon and with the body and certain parts and members thereof of [the victim], a child under the age of fourteen years, by use of force, violence, duress, menace, and fear of immediate and unlawful bodily injury, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and the said child."

June 23, 2003, was the victim's seventh birthday. Therefore, the offense was alleged to have occurred during the year when the victim was seven years old. The victim testified that the first incident of defendant sexually touching her occurred in 2006, when she was nine years old. Later, after the prosecutor refreshed the victim's recollection, the victim testified that defendant began sexually touching her when she was eight years old. On cross-examination, the victim stated that she remembered the first touching incident occurred when it was "almost" her eighth birthday.

2. *Analysis*

Defendant contends that his due process rights were violated because he was charged with forcibly molesting the victim when the victim was seven years old; however, substantial evidence does not support the finding that the victim was molested at age seven. We disagree.

When reviewing a record for substantial evidence we examine the entire record in the light most favorable to the judgment, determining whether it contains evidence of reasonable, credible, and solid value that would support a reasonable trier of fact's guilty finding. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 656-657 [Fourth Dist., Div. Two].)

In order to sustain a conviction for molestation, "the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 316.)

The victim testified on cross-examination that the first molestation occurred when it was "almost" her eighth birthday. The victim's testimony describes the general time period in which the molestation occurred. It can be inferred that the general time period was a few days or weeks before June 23, 2004, i.e., before the victim's eighth birthday. Accordingly, we conclude that substantial evidence supports the conclusion

that the offense in count 1 was committed within the time period alleged in the information. Therefore, defendant's due process rights were not violated.

Defendant contends that the evidence supports a finding that the first molestation occurred *on* the victim's eighth birthday, rather than *prior to* the victim's eighth birthday. Contrary to defendant's position, the victim testified that the molestation occurred when it was "almost" her eighth birthday. The victim also testified that the molestation occurred "around" her eighth birthday. The victim described going to Los Angeles for lunch to celebrate her eighth birthday, and stated that the first molestation occurred when the family returned home after lunch. It is not clear from the victim's testimony whether the family celebrated her birthday on her actual birthday, or if the celebration occurred the weekend before her birthday. Accordingly, because the victim's testimony describes the general time period in which the molestation occurred, we do not find defendant's argument persuasive.

We note that although defendant refers to his due process rights, it does not appear that he is arguing that the offense occurred outside of the statute of limitations. Accordingly, we have confined our analysis to reviewing whether substantial evidence supports a finding that the offense occurred within the time period alleged in the information.

B. COUNTS 4 AND 7

1. *Facts*

Count 4 of the information charged defendant with forcibly committing a lewd and lascivious act upon the victim, between June 23, 2006, and July 17, 2006. (§ 288,

subd. (b)(1).) The prosecutor did not elect any particular act to constitute count 4. Rather, during closing arguments, the prosecutor said, "Lewd and lascivious acts on a child under the age of 14 years with force or fear. The defendant touched any part of the child's body, either through skin or the child's bare body. What did you hear yesterday? Any one of those incidents, when he touched her, any way, skin on skin or his hand on her clothes touching her breast."

Count 7 of the information charged defendant with raping the victim on or between June 23, 2006, and July 17, 2006. During closing arguments, the prosecutor said, "From 2004 to July 17, 2006, [the victim] was consistent. [Being raped] happened one time when I was eight, two times when I was nine, and one time when I was 10."

The victim testified that when defendant first sexually touched her, he tried to touch her breasts, genitals and buttocks through her clothes, and he tried to kiss her lips. Defendant then progressed to removing the victim's clothes before touching her. The victim stated that defendant would remove her shirt and pants, and touch her inner thighs and genitals with his hands. When the victim was 10 years old, defendant grabbed the victim around her waist, and pulled her into a bedroom. Defendant pushed the victim onto a bed, and used her wrists to hold her down. Defendant removed the victim's pants and underwear, and inserted his penis into her vagina.

The victim recalled defendant touching her more than 10 times when she was eight years old, and more than 20 times when she was nine years old, but could not recall how many times defendant touched her when she was 10 years old. The victim

testified that defendant raped her a total of four or five times between the ages of eight and 10 years old.

2. *Analysis*

The acts in counts 4 and 7 were alleged to have occurred on or between June 23, 2006, and July 17, 2006, when the victim was 10 years old. Defendant asserts that the only event that the victim described occurring during that time period was the rape that began by defendant grabbing the victim's waist. Consequently, defendant contends that the trial court erred by imposing full-term consecutive sentences for counts 4 and 7, because the acts were not committed on separate occasions, i.e., they were part of a single transaction. (§ 667.6, subd. (d).) We disagree.

Section 667.6, subdivision (d), provides: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (See also Cal. Rules of Court, Rule 4.426(a)(2).)

Case law has provided, "'[A] finding of "separate occasions" under . . . section 667.6 does not require a change in location or an obvious break in the perpetrator's behavior: "[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter."'" (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

"Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. [Citations.]" (*People v. Garza, supra,* 107 Cal.App.4th at p. 1092.)

The victim testified that defendant grabbed her around her waist, and pulled her to the bedroom. Defendant touched the victim's breast and genitals. Defendant pushed the victim onto the bed and held the victim down by her wrists. Defendant tried to kiss the victim's lips, but the victim resisted. The victim tried to get off the bed, but defendant pushed her down again. Defendant tried to remove the victim's pants and underwear, but she struggled against him. Defendant ultimately removed the victim's underwear and his "shorts." Defendant pushed his penis into the victim's vagina.

A reasonable trier of fact could find that defendant had a reasonable opportunity to reflect between the acts of touching the victim's breast and genitals and the act of inserting his penis into the victim's vagina. Specifically, defendant had an opportunity for reflection when the victim was resisting defendant's attempts to kiss her, when the

victim was trying to leave the bed, and when the victim was trying to pull her pants up. Accordingly, we conclude that the trial court did not err.

Defendant argues that the record does not reflect that he had a reasonable opportunity for reflection, because the evidence does not demonstrate that defendant's criminal acts were "spaced in time such that [defendant] had 'a reasonable opportunity for reflection." As noted *ante*, the record does not need to reflect an obvious break in defendant's behavior for the sex acts to constitute separate transactions. (*People v. Garza, supra*, 107 Cal.App.4th at p. 1092.) Accordingly, we do not find defendant's argument persuasive.

C. SENTENCING

Defendant contends the trial court erred when it pronounced his sentence for counts 6 as, "[Y]ou are committed to state prison for life in state prison, with a minimum period of confinement of 15 years." Defendant also contends that the trial court erred when it pronounced his sentence for count 7 as, "[T]he Court will order that you be committed to state prison for the indeterminate term of life, with a minimum term of 15 years before you would be considered eligible for parole consideration." Defendant asserts that the trial court erred when pronouncing the sentences because defendant is entitled to receive credit for time served, and the minimum terms of 15 years do not account for credits that defendant has earned or will earn. We disagree.

In defendant's opening brief, it is unclear if he is concerned with the impact of the alleged error on his presentence credits and/or his postsentence credits. In defendant's reply brief, he appears to be arguing that the alleged error will have an

unfair impact on his postsentence credits. In order to be thorough, we will address both presentence and postsentence credits.

1. *Presentence Credits*

We begin by addressing defendant's presentence credits. Our Supreme Court has concluded that "for the purposes of computing and allowing credits, of forfeiting credits, and of redetermining the length of time of imprisonment, a prisoner confined under consecutive sentences must be regarded as undergoing a single, continuous term of confinement rather than a series of distinct, independent terms." (*In re Cowen* (1946) 27 Cal.2d 637, 643.) Based upon the foregoing rule, if a defendant has been sentenced to consecutive prison terms, then any custody credits awarded to him "must be computed against the total term." (*People v. Schuler* (1977) 76 Cal.App.3d 324, 330, fn. 10.)

The trial court sentenced defendant to consecutive terms of imprisonment on all of the counts. At the end of the sentencing hearing, the trial court said, "Your credit for time served through today is 956 days actual custody, 143 pursuant to [s]ection 2933.1 of the Penal Code, for a total of 1,099 days. The trial court's minute order reads, "CREDIT FOR TIME SERVED of 956 actual days plus 143 days pursuant to 2933.1 [of the Penal Code] for a total of 1,099 days." The abstract of judgment for defendant's determinate sentence, reflects that defendant was awarded 956 days of custody credit and 143 days of conduct credit, for a total of 1,099 days of credit.

Defendant was sentenced to consecutive terms of imprisonment. Accordingly, defendant's sentences must be viewed as a single continuous term of confinement.

Therefore, the trial court was correct to award custody credits only once. In sum, we find no error.

2. *Postsentence Credits*

In his reply brief, defendant asserts that the trial court erred by pronouncing his sentences for counts 6 and 7 as "life with a minimum of 15 years" because defendant is entitled to receive postsentence credits (§ 2933.1), but cannot, due to the "minimum of 15 years" that he must serve. In other words, defendant is concerned that he will have to serve the full 15-year terms, without any credits.

In counts 6 and 7, defendant was convicted of the aggravated sexual assaults (rape) of the victim. (§ 269, subd. (a)(1).) An aggravated sexual assault conviction is punished "by imprisonment in the state prison for 15 years to life." (§ 269, subd. (b)(1).) Our Supreme Court has noted that the foregoing "15 years to life" sentencing requirement is "an indeterminate sentence that includes a minimum term." (*People v. Jefferson* (1999) 21 Cal.4th 86, 93, fn. 2.) Based upon our Supreme Court's precedent, we conclude that the trial court did not err by pronouncing defendant's sentences in counts 6 and 7 as "life with a minimum of 15 years."

Defendant does not explain his theory of how the trial court erred; rather, defendant simply concludes that the trial court's sentencing pronouncement was "clear error." We infer that defendant believes the alleged error is "clear" because section 269 does not explicitly include the phrase "minimum term of imprisonment." To the extent that defendant was attempting to raise such an argument, we disagree.

Our Supreme Court has explained that the minimum term may not be found in the sentencing statute; rather, it can found in the statute which provides the standards for parole ineligibility (§ 3046). (*People v. Jefferson*, *supra*, 21 Cal.4th at p. 96.) Section 3046, subdivision (a), provides: "No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."

Section 269, subdivision (b)(1), provides for a punishment of 15 years to life in state prison. 15 years is greater than seven years. Accordingly, it is section 3046, subdivision (a)(2), which is applicable to defendant's sentence. Therefore, we conclude, as the Supreme Court did, that section 269, subdivision (b)(1), provides for a minimum term of 15 years.

DISPOSITION

We affirm the judgment.

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/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ KING
J.